Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-262

No. ~~1806~~

PEARLY MAE CARTER, *Petitioner,*

v.

MOREHOUSE PARISH SCHOOL BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1970

No.

PEARLY MAE CARTER, *Petitioner*,

v.

MOREHOUSE PARISH SCHOOL BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. OPINIONS BELOW

The District Court for the Western District of Louisiana did not deliver a written opinion. The opinion of the Court of Appeals for the Fifth Circuit is not yet reported but appears in the Appendix at pages 2a-4a.

II. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 6, 1971, and a copy thereof is appended to this petition in the Appendix at page 5a. The petition of Pearly Mae Carter for a rehearing was denied on April 29, 1971, and a copy of the denial is appended to this petition in the Appendix at page 6a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III. QUESTIONS PRESENTED

During the trial of this matter petitioner called on cross examination the two persons mainly responsible for her dismissal. While the second witness was being questioned, the District Judge, Ben C. Dawkins, Jr., stated that he would order that she be rehired and would grant her prayer for relief. Respondents entered no objection to the judge ruling at the time he did so. The questions presented are:

1. Whether under Fed. R. Civ. P. 46, respondents waived any objection to the Court ruling before respondents presented their evidence by neither objecting nor making a proffer of proof.

If the above question is answered in the affirmative then the Circuit Court ruling should be reversed. If it is answered in the negative then the following question remains:

2. Whether the actions of the District Judge in ruling that petitioner must be rehired after hearing testimony of the two persons mainly responsible for her dismissal but before respondents presented their evidence denied respondent due process of law.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of Section I of the Fourteenth Amendment to the United States Constitution; 42 U.S.C. 1983, and Fed. R. Civ. P. 46 are reprinted in the Appendix at page 1a.

V. STATEMENT

Pearly Mae Carter, petitioner herein, is a Negro citizen of the United States, and a resident of Morehouse Parish, Louisiana. She is a duly certified and qualified fourth grade teacher; she holds a bachelor's and master's degree in elementary education. She has been a teacher twenty-one years, and had taught the three years prior to institution of this action for the Morehouse Parish School Board.

In March, 1970, Mrs. Carter's class was taking the Iowa Tests of Basic Skills. Administering the tests to Mrs. Carter's class was one Mrs. Jean Bright, a non-professional white school board employee. The tests were to determine certain achievement levels of the children. It is agreed that the tests were not teacher comprehension or rating tests of any sort and were not used as such.

While her class was taking the test over a period of days, Mrs. Carter encouraged her students to take the tests seriously and to cooperate with Mrs. Bright. Mrs. Carter pretended to be taking the tests and randomly marked answers. Although no teacher had ever been known to take the test, Mrs. Bright took the answer sheet upon which Mrs. Carter had been randomly marking answers, graded it without her consent or knowledge and reported the allegedly low score to Mr. O. L.

Harper, the superintendent. The answer sheet has since been destroyed.

Though Mrs. Carter explained the circumstances surrounding the marked answer sheet, she was forced to submit to a second test. Mr. Harper testified at the trial that he believed that she was truly "playing around" but required that she take the second test to prove her ability to the white people who thought black teachers were not competent.

On June 1, 1970, Mrs. Carter was advised by letter that she should resign in order to ". . . prevent any information of a derogatory nature being placed in . . ." her file. Mrs. Carter did not resign and was notified on July 10, 1970, that she had been dismissed. On August 17, 1970, a hearing was held by the Board. Mrs. Carter's dismissal was affirmed.

This action was filed on August 24, 1970 in the U.S. District Court for the Western District of Louisiana, alleging that Mrs. Carter had been dismissed solely because of her race, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction in the district court was invoked pursuant to 42 U.S.C. 1981-85 and 28 U.S.C. 1343(3) 2201, and 2202. She prayed that she be ordered reinstated. In its answer to the complaint respondents admitted that the dismissal was predicated solely on the basis of the test score.

A hearing was held on September 7, 1970, Judge Ben C. Dawkins, Jr. presiding. At the trial petitioner first called Mr. Harper on cross examination. He was examined extensively by counsel for both petitioner and respondent, and by the district court judge.

The other party instrumental in the dismissal of petitioner, Mrs. Jean Bright, was examined by petitioner's counsel after Mr. Harper was excused. While Mrs. Bright was being examined Judge Dawkins stated that perhaps the case had gone far enough and that he would grant a preliminary injunction. Counsel for respondents made no objection but did ask the judge two questions. One question concerned the grounds for the decision and the second was whether the Board might take any future action against Mrs. Carter. No statement of any sort was made concerning the propriety of the judge's ruling at the time he did so. Formal judgment was entered for petitioner on September 24, 1970, along with Findings of Fact and Conclusions of Law. (Appendix, pages 7a-8a.)

On appeal the Court of Appeals vacated the district court judgment and remanded the case. The Court held that the district court erred in choosing not to hear the respondents' evidence in rebuttal. Further, the Court held that respondents' failure to object was excused because they had no opportunity to object as contemplated by Fed. R. Civ. P. 46. The Court stated that respondents should not be required to object because at the hearing the judge indicated that the reasons offered for dismissal were insufficient and subsequently, in his findings of fact stated that petitioner's dismissal was racially motivated. Thus, the Court theorized that had respondents known the "real basis" of the decision they "might well" have chosen to offer evidence and perhaps object to the ruling of the district judge. The Court of Appeals concluded by holding that the school board had been denied due process of law.

VI. REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets Rule 46 of the Federal Rules of Civil Procedure and, as a result, effectively frustrates any efforts that black educators might make to protect their civil rights when they are dismissed because of their race. The decision below gives encouragement to defendant school boards to consciously "plant" an error in district court proceedings by simply remaining silent and failing to object to potential errors. When the boards are permitted to raise these "planted" errors on appeal and win a reversal and remand as the decision below allows, then petitioner and other black educators must sustain the burden of greatly increased attorney's fees, printing fees, docketing fees, and the community pressures resulting from prolonged and controversial litigation.

In other words, the decision below provides school boards with another weapon in ridding their systems of black teachers and administrators: attrition. To allow this practice to prevail will close the doors of the courts to black educators after they have been the victims of a racial purge by the local school boards.

Secondly, the decision below should be reviewed because the interpretation of Rule 46 of the Federal Rules of Civil Procedure is important to the practical aspects of trial practice in the United States District Courts. The federal bar is in need of guidance via a decision. Petitioner can find no decision of this Court considering Rule 46.

Rule 46 has been applied in numerous appellate cases which have held that certain issues could not be raised

on appeal because of appellant's failure to enter a proper objection in the district court. *Baker* v. *Sherwood Construction Co.*, 409 F. 2d 194 (10th Cir. 1969); *Colonial Refrigerated Transportation, Inc.* v. *Mitchell*, 403 F. 2d 541 (5th Cir. 1968); *Bacon* v. *K. C. Southern Ry. Co.*, 373 F. 2d, 515 (5th Cir. 1967); *Southern Ry. Corp.* v. *Vaughn*, 359 F. 2d 424 (5th Cir. 1966); *Ford* v. *United Gas Corp.*, 254 F. 2d, 817 (5th Cir. 1958); *Louisiana and Ark. Ry. Co.* v. *Johnson*, 214 F. 2d 290 (5th Cir. 1954), cert. denied, 348 U.S. 875 (1955). All of the cited cases generally accept the purpose of Rule 46 to be:

> "to inform the trial judge of possible errors so that he may have an opportunity to reconsider his ruling and make any changes deemed admissable. It is therefore the general rule that points not raised and preserved below will not be considered on appeal. (Citations omitted.)
>
> *Fort Worth & Denver Ry. Co.* v. *Harris*, 230 F. 2d 680, 682 (5th Cir. 1956).

Accepting the above to be the proper purpose of Rule 46 it has accordingly been held that:

> "A litigant may not, speculating on a verdict without making objection, keep silent while matters are transpiring in the trial court and then put the trial judge in error by assigning error in the appellate court in respect of them . . ." *Ford* v. *United Gas*, *supra* at 818.

The decision below flies directly in the face of the decisions cited *supra* and potentially throws into confusion all trial practice in the federal courts.

It must be noted that the decision below finds that respondents had no opportunity to object. The Court reasoned that since the district judge's oral reasons for judgment and formal findings seemingly conflicted that had respondents known the "real basis" of the court's ruling, "they might well" have offered rebuttal evidence. The Court of Appeals was forced to use the term "might" because respondents have *never* intimated by brief or otherwise that they were misled by the district judge's oral reasons for judgment. In effect, the Court of Appeals indulged in the dangerous practice of supplying judicially conceived conjecture as the basis of its decision though respondents have never claimed such conjecture has any basis in fact. It is the duty of this Court to curb such actions.

Finally, the decision below should be reviewed to consider the question (provided it is held respondents could raise the issue on appeal) whether a district judge must continue a trial similar to the one in question here once he finds racial motivation on the part of the school board in the dismissal of a plaintiff teacher. The district court judge found racial motivation and stated that he would accordingly grant the petitioner's prayer for relief. Petitioner submits that once the district judge noted or found racial motivations for petitioner's dismissal there was no possible proof that respondents could have presented that could change the ultimate decision of the Court; the rehiring of petitioner had to be ordered once racial motivation was found and no justification by the school board was possible. Whereas it appears black teacher dismissal suits will continue to increase in number, this Court should settle the question whether there is any defense to a proven racially motivated dismissal.

VII. CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV of the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state of Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fed. R. Civ. P. 46:

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection does not thereafter prejudice him.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31017

Summary Calendar*

PEARLY MAE CARTER, *Plaintiff-Appellee,*

versus

MOREHOUSE PARISH SCHOOL BOARD, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

(April 6, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: The Morehouse Parish School Board (the Board) appeals from an order of the district court directing that plaintiff-appellee Pearly Mae Carter be reinstated as a teacher at St. Matthew Elementary School, Mer Rouge, Louisiana. Because the defendant school board was not given an opportunity to present its case, we vacate the order and remand the cause for a full and complete trial.

Mrs. Carter, a black teacher in an integrated school, was dismissed on July 10, 1970. At a hearing held on August 17, 1970 by the Board, the dismissal was affirmed, the Board having found that Mrs. Carter was incompetent as a teacher because she scored poorly on an achievement test intended for sixth grade students.

Mrs. Carter filed suit in federal court seeking reinstatement; it was her contention that her dismissal was racially motivated. A trial was conducted on September 7, 1970.

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* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citiens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

During the testimony of the plaintiff's second witness, the court interrupted to initiate the following dialogue:

> THE COURT: . . . Frankly, at this point I would say a test of that kind, where according to Mr. Harper in his discussions with Mrs. Carter, she was more or less playing around and it wasn't a teacher's test. It was a student's test, and that would not be a valid ground for dismissal.
>
> I think that is as far as we need to go in the case. So, the Court will grant the prayer of the plaintiff.
>
> She will achieve tenure this year and if she proved to be unfit or incompetent, proper measures exist under state law to rectify that situation.
>
> MR. TRAYLOR: [Attorney for defendants] Is what Your Honor saying that this test that Mrs. Carter took insufficient reason for the Board to take the action which it did?
>
> THE COURT: Yes, sir.
>
> As I understand the prayer for relief, there is a permanent injunction asked for against the Morehouse Parish School Board. We will not grant the permanent injunction. We will grant the preliminary injunction so that if it develops later that this required test is given to the teachers—the accepted National Teacher's Examination, or for other valid reasons incompetency is shown, then if proper grounds exist she might be dismissed.
>
> MR. TRAYLOR: That is the point I want to be clear on. I want to be clear on if the Board may take any action in the future.
>
> THE COURT: Certainly.

Although the defendant had numerous witnesses present and ready to testify on the issue of Mrs. Carter's alleged

incompetency, the proceedings were thereupon terminated. The court's order, dated September 24, 1970, recited in their entirety, the following "Conclusions of Law":

> 1. Plaintiff's dismissal by the Morehouse Parish School Board because of her race resulted in a denial to plaintiff of her right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution entitling her to relief.
>
> 2. All of the acts resulting in plaintiff's dismissal were under color of the law of the State of Louisiana.

It is our opinion that the district court committed error in choosing not to hear the defendant's evidence in rebuttal. Although appellants made no objection to this procedure, they could not reasonably have been expected to do so. The trial court indicated to appellants that his ruling was to be essentially that the test was an insufficient reason for the Board to take the action which it took. This reasoning requires far different evidence for rebuttal and different argument on appeal than the reasoning in the court's final order that, as a matter of fact, plaintiff's dismissal was racially motivated. Had appellants known the real basis of the court's proposed ruling, they might well (would undoubtedly) have chosen to offer evidence in rebuttal. A ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process. See *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Frito Lay, Inc.* v. *Morton Foods, Inc.*, 316 F.2d 298 (10th Cir. 1963).

VACATED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 31017

Summary Calendar

D.C. Docket No. CA 15976

PEARLY MAE CARTER, *Plaintiff-Appellee,*

versus

MOREHOUSE PARISH SCHOOL BOARD, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 6, 1971

Issued As Mandate.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31017

Summary Calendar

PEARLY MAE CARTER, *Plaintiff-Appellee,*

versus

MOREHOUSE PARISH SCHOOL BOARD, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

(April 29, 1971)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 15,976

PEARLY MAE CARTER

versus

MOREHOUSE PARISH SCHOOL BOARD,
O. L. HARPER, SUPERINTENDENT, CARROLL HILL, PRESIDENT

Findings of Fact

1.

Pearly Mae Carter was dismissed by the Morehouse Parish School Board solely because of racial motivations.

2.

When Mrs. Carter was alleged to have taken a fourth grade achievement test she was not seriously taking the test but was merely randomly marking answers to illustrate to the children in the class the test instructions.

3.

The test in question, The Iowa Test of Basic Skills, is not an indicator or guide in any way of the ability or skill a teacher possesses but was used and is used merely to measure pupil achievement in certain basic areas.

4.

The sole reason the first answer sheet on which Mrs. Carter marked was ever graded was because of her race.

5.

The sole reason she was required to take a second test was because of her race.

6.

The first answer sheet was not available and had apparently been destroyed.

Conclusions of Law

1.

Plaintiff's dismissal by the Morehouse Parish School Board because of her race resulted in a denial to plaintiff of her right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution entitling her to relief.

2.

All of the acts resulting in plaintiff's dismissal were under color of the law of the State of Louisiana.

Judgment

IT IS THEREBY ORDERED, ADJUDGED, AND DECREED that a preliminary injunction issue herein ordering the Morehouse Parish School Board to reinstate Pearly Mae Carter to her former position as a teacher and to compensate her for all lost time as a result of the unlawful dismissal.

Shreveport, Lousiana, this 24th day of September, 1970.

/s/ BEN C. DAWKINS, JR.
United States District Judge

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-262

PEARLY MAE CARTER,

Petitioner,

versus

MOREHOUSE PARISH SCHOOL BOARD,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 70-262

Pearly Mae Carter,

Petitioner,

versus

Morehouse Parish School Board,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

I. STATEMENT OF THE CASE

Appellant, in its statement of the case, said that Mrs. Carter pretended to be taking the test and *randomly* marked answers. This is misleading. The record does not show that she marked the answer sheet without benefit of the questions. R.9.

Also misleading is the bare statement that Mrs. Carter's answer sheet was destroyed. Mrs. Bright, the test administrator, told the court that answer sheets are always destroyed after the grades are recorded, as a regular procedure. R.25. The materials used in testing are controlled, accountable items, that must be returned to the central office in order to insure the integrity of the testing system. R.26, 27.

Appellant also stated that Mrs. Carter was forced to take the second test. Actually, by scoring poorly on a fourth grade level achievement test, Mrs. Carter created a bad image of herself as a teacher, whether or not it was sincerely taken. Mr. Harper, the School Superintendent, indicated to Mrs. Carter that if she would take the second test and do well on it, the problem they were confronted with would be solved. R.18.

Also Appellant made the statement that Mrs. Carter was required to take the second test "to prove her ability to the white people who thought black teachers were not competent." Mr. Harper admitted making a similar statement but testified that this was something a white teacher in the same circumstance would also have to do to prove himself and specifically denied that any racial bias was involved in this case. R.21.

In relating the Court of Appeals ruling, Appellant said that the court held Respondent School Board's failure to object to the judge making a decision before hearing its evidence was excusable because they "had no opportunity to object as contemplated by Fed. R. Civ. P. 46". This was not in fact the Court of Appeals' holding. The opinion stated that "although the defendant had numerous witnesses present and ready to testify on the issue of Mrs. Carter's incompetency, the proceedings were thereupon terminated" and that "(a)lthough appellants made no objection to this procedure, they could not reasonably have been expected to do so." There was no citation of Rule 46.

II. REASONS FOR NOT GRANTING WRIT

A. THE PROPER INTERPRETATION OF FED. R. CIV. P. 46 IS NOT AT ISSUE SINCE THE COURT OF APPEALS RULED ON THE SCHOOL BOARD'S ALLEGED FAILURE TO OBJECT TO DENIAL OF BASIC RIGHT TO BE HEARD, WITHOUT REFERENCE TO THE RULE.

Contrary to Appellant's contentions on page 6 of its application for writs, the Court of Appeals decided this case without citation of or reference to Fed. R. Civ. P. 46. All that the court said in connection with the School Board's failure to express its objection to the District Court Judge ruling without hearing defendant's evidence was in the Court of Appeals opinion as follows:

> "It is our opinion that the district court committed error in choosing not to hear the defendant's evidence in rebuttal. *Although appellants made no objection to this procedure, they could not reasonably have been expected to do so.*" (emphasis added)

Therefore, the Court of Appeals decision could not possibly work to confuse federal trial practice as to the Rule. This Court of Appeals case cannot correctly be cited as an interpretation of Fed. R. Civ. P. 46. Since *Carter v. Morehouse Parish School Board*, the law concerning Rule 46 remains unchanged.

We admit that there is apparent confusion in the federal jurisprudence over the correct use of the Rule, which according to its language, is concerned with exceptions to *rulings or orders* of the court. Contrarily, in many of the federal decisions Rule 46 is interpreted as applying to original exceptions, not only to exceptions to ruling or orders of the court. See *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541 (5th Cir. 1968), *Bringegar v. San Ore Const. Co.*, 302 F. Supp. 630, D.C. Ark 1969. It appears that generally objections are always necessary to preserve the question for review and under the new rule only failure to except to *rulings* on objections when there is no opportunity to do so does not prejudice the party thereafter. See *Pfau v. Whitcover*, 139 F. 2d 588 (4th Cir. 1943), *Faudree v. Iron City Sand & Gravel Co.*, 315 F.2d 647 (3rd Cir. 1963). But the cases using Rule 46 confuse it to mean that an original objection, as with which our case is concerned, is excused under the "no opportunity" clause. There is also confusion in using Rule 46 to reduce the formality required for original objections, instead of *rulings* on objections. See *Gordon v. Robinson*, 210 F.2d 192 (3rd Cir. 1954), *Oslund v. State Farm Mut. Auto. Ins. Co.*, 242 F.2d 813 (9th Cir. 1957). Admitting that confusion exists with regard to Rule 46, we contend that this case is not a proper one in which to attempt to clarify its application. All the Court of Appeals said was that in this particular case, at the particular time an objection would ordinarily be required, one was not reasonably expected because the error occurred just before final judgment was announced.

Should the Appellant contend, even without relying on the application of Rule 46, that this decision of the Court of Appeals allows defendant school boards to wear down black plaintiffs by reversals on errors not objected to, there is no problem with this case. The court did not in any way say that objections were not required to preserve questions for appeal, except where it would not be reasonable to expect an objection, such as in this case where the final judgment came right on the heels of the error brought up for review. This situation could not happen often enough to be of any significance as a weapon of attrition.

B. IF RULE 46 SHOULD BE APPLICABLE, IT MAY BE SAID THAT THE COURT ASSUMED DEFENDANT SCHOOL BOARD TOOK AN OBJECTION TO ITS RULING BEFORE AFFORDING DEFENDANT OPPORTUNITY TO PRESENT EVIDENCE OF MRS. CARTER'S INCOMPETENCE AS A TEACHER.

In *U.S. v. National Biscuit Co.*, 25 F. Supp. 329, D.C. S.D. New York, 1938, the court, upon directing verdict for the defendant assumed that plaintiff took an objection to that ruling in accord with this rule under which formal exception is unnecessary. Here the judge had before him both sides of the case and directed a verdict upon the motion, assuming a proper objection complying with Rule 46. How much more proper would it be for a judge to assume objection by the party decided against before that party's side of the case had ever been presented. In a case where the error committed is so basic and obviously prejudicial, especially where the final decree comes directly after

that error, objection could reasonably be said to be implicit and the lack of explicitness could be justified by the time at which the error occurred.

C. EVEN SHOULD AN OBJECTION BE REQUIRED UNDER RULE 46 AND IF AN IMPLIED OBJECTION CANNOT SERVE, ALTHOUGH THERE IS NO OPPORTUNITY TO OBJECT UNTIL AFTER FINAL JUDGMENT, THE COURT OF APPEALS HAS DISCRETIONARY POWER TO REVIEW THE ALLEGED ERROR ON ITS OWN MOTION IN THE INTEREST OF JUSTICE.

Federal jurisprudence solidly supports the discretion exercised by the Court of Appeals in this case in order to prevent the School Board from being denied its basic right as a litigant, the right to be heard. *Curko v. William Spencer & Son, Corp.*, 294 F.2d 410 (2nd Cir. 1961).

> "Absence of timely objection does not necessarily preclude consideration of error which may have resulted in miscarriage of justice," *Citron v. Aro Corp.*, 377 F.2d 750 (3rd Cir. 1967) certiorari denied 88 S.Ct. 473.
>
> "New trial may be granted by federal appellate court though no objection is made and no exception is taken, where error is so great that justice requires that it should be corrected." Jud. Code Sec. 269, as amended Fed. Rules Civ. Proc. rules 59, 61, 28 U.S.C.A.; *Maryland Casualty Co. v. Reid*, 76 F.2d 30 (5th Cir. 1935).

> "An appellate court may notice plain errors, even though they were not properly excepted to below." *Louisiana & A. Ry. Co. v. Moore,* 229 F.2d 1 (5th Cir. 1956), certiorari denied 76 S.Ct. 849.
>
> "It is customary for appellate court to take notice of manifest error to which no exception has been taken." *N.L.R.B. v. Red Spot Elec. Co.,* 191 F.2d 697 (9th Cir. 1951).

A fortiori, it has been held that a court *must* notice and correct the error if it is fundamental and highly prejudicial and the failure to object may have resulted in miscarriage of justice. *Freifield v. Hennessy,* 353 F.2d 97 (3rd Cir. 1965).

Appellant quoted the court in *Ford v. United Gas Corp.,* 254 F.2d 817 (5th Cir. 1958) certiorari denied 79 S.Ct. 40 to say:

> "A litigant may not, speculating on a verdict without making objection keep silent while matters are transpiring in the trial court and then put the trial judge in error by assigning error in the appellate in respect of them. . ."

But Appellant did not finish the quoted sentence which ends with the words *"except in case of plainly prejudicial error."* (emphasis added) We need not question where a party would be subject to a more prejudicial error than in the case where he is ruled against before he has the opportunity to present his evidence to rebut plaintiff's charge.

D. FINALLY, THE COURT OF APPEALS HOLDING THAT A VERDICT BASED ON UNCONTESTED EVIDENCE DENIES DUE PROCESS, IS NOT ONLY IN ACCORD WITH RECENT JURISPRUDENCE BUT PROVIDES WISE AND CRUCIAL GUIDANCE FOR FUTURE LITIGATION BETWEEN PERSONS OF DIFFERENT RACES.

A fundamental requirement of due process is the opportunity to be heard. See *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965). Respondents contend that it was a denial of this basic right for the judge to rule without first hearing all the evidence from both sides of the case.

> "An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in Court." *Frito-Lay, Inc. v. Morton Foods, Inc.*, 316 F.2d 298 (10th Cir. 1963).

The Court of Appeals cited *Armstrong* and *Frito-Lay* in their opinion reversing the District Court in favor of Morehouse Parish School Board, Respondent in the present case.

In their application to this Court for writs, Appellants contend that the judge had the right to decide the case summarily because the written finding of fact and judgment of the District Court contained statements that as a "matter of fact, plaintiff's dismissal was racially motivated", and propose that once a district judge notes or finds racial motivation the case need

not proceed any further Certainly, even if there was evidence of racial motivation, of which there was *none* in the present case, the opposing side is due the opportunity to present a rebuttal of some kind. If a court is allowed to decide a matter summarily, giving oral reasons indicating no finding of racial discrimination, without hearing defendant's evidence, where no evidence of racial discrimination exists, there merely being a black plaintiff and a white defendant, an extremely dangerous, if not disastrous precedent would be set for the future. The power of a local school board to guard the quality of education provided for both blacks and whites would be destroyed. All that a black teacher would have to show when charged with incompetence, no matter how incompetent he might be, would be that he was black, if Appellant's contentions were accepted. Certainly more problems would be created by this sterilization of the local school board than could possibly be solved by such a complete relaxation of a black plaintiff's burden of proof, and stifling of defendant's Constitutional right to be heard.

Appellant closes his formal application for writs to this Honorable Court with the statement that:

> "Whereas it appears black teacher dismissal suits will continue to increase in number, this Court should settle the question whether there is any defense to a *proven* racially motivated dismissal." (emphasis added)

Respondent School Board would agree fully with Appellant's statement, but it has no relevance to this case. As we stated in our brief for the Court of Appeals:

> "This case deals plainly and simply with the lawful dismissal of a teacher who was incompetent in the opinion of the Superintendent of Schools of Morehouse Parish and the Morehouse Parish School Board. We respectfully direct Your Honors' attention to the entirety of the record made up on September 7, 1970, at the hearing before the United States District Court for the Western District of Louisiana which we submit *contains not one scintilla of evidence to justify any allegation of racial prejudice or impropriety by the Superintendent or the Board.*"

Much less would the record justify a summary decision of the case on a racial basis not giving the defendant the benefit of the real reasoning behind the decision or even a chance to rebut that evidence which was actually presented by the plaintiff.

Certainly because the respective parties to a lawsuit happen to be of different races is no justification to abate the Constitutional guarantees due to either of the parties. The Appellants have cited no authority to support their position as to this point, and Respondent respectfully submits that none exists.

III. CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIFICATE

I, John E. Jackson, Jr., a Member of the Bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing has been served upon opposing counsel of record, Carl Kidd, Esq., 310 South Grand, Monroe, Louisiana 71201, by placing a copy of the same in the United States Mail this date, postage prepaid, and properly addressed.

New Orleans, Louisiana, this ____ day of September, 1971.

John E. Jackson, Jr.
Second Assistant Attorney General